

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NICACIO JAMIES-MORENO)	
Claimant)	
)	
VS.)	
)	Docket No. 214,363
IBP, INC.)	
Respondent)	
Self Insured)	

ORDER

Respondent appealed Administrative Law Judge Pamela J. Fuller's Award dated January 26, 2001. The Board heard oral argument on August 15, 2001. Jeff K. Cooper was appointed Board Member Pro Tem to serve in place of Board Member Gary M. Korte who recused himself from this proceeding.

APPEARANCES

Claimant appeared by his attorney, James Phillips, Jr. of Wichita, Kansas. The self-insured respondent appeared by its attorney, Wendel W. Wurst of Garden City, Kansas.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge determined claimant sustained an accidental injury arising out of and in the course of employment with respondent and awarded claimant an 11 percent permanent partial general disability based on functional impairment. Respondent requests review of the finding the claimant met with personal injury by accident arising out of and in the course of employment with respondent. In addition, respondent requests review of the determination of the nature and extent of claimant's functional impairment and whether such impairment, if any, is attributable to claimant's preexisting condition.

Conversely, claimant requests the Board affirm the Administrative Law Judge's decision.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the complete evidentiary record filed herein, and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The Board finds the Administrative Law Judge's Award should be affirmed. The Board finds the Administrative Law Judge's findings and conclusions contained in her award are accurate and appropriate. The Board concludes there is no need to reiterate those findings and conclusions in this Order. Therefore, the Board adopts the Administrative Law Judge's findings and conclusions as its own.

The respondent initially argues that claimant was only employed for approximately a month and his condition is related to prior injuries sustained by claimant while working for other employers in the past.

Claimant testified his prior complaints had resolved and he did not have any physical complaints when he applied for work with respondent. Moreover, claimant passed the company physical in May 1996. The claimant described a work-related incident which occurred on June 11, 1996, when he experienced an onset of pain in his shoulders and neck while working with a large piece of meat. Dr. Tisdale, the court appointed independent medical examiner, concluded claimant's condition was the result of his work-related incident. Dr. Prostic also opined claimant's neck and right upper extremity complaints were related to the work-related incident. The Board concludes claimant has met his burden of proof to establish that he sustained accidental injury arising out of and in the course of employment on June 11, 1996, and affirms the Administrative Law Judge.

Respondent next argues that claimant's current impairment of function was preexisting. This argument is premised upon the fact that claimant had sought treatment in the past for upper extremity, neck and back complaints. In addition, claimant had entered a compromise settlement of a workers compensation claim in California in 1993 for a back injury which included complaints of neck, shoulder and back pain.

K.S.A. 1996 Supp. 44-501(c) provides: "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

The Kansas Court of Appeals in *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184 (2000), *rev. denied* ___ Kan. ___ (2001), addressed the foregoing statute, distinguishing between a preexisting condition and a preexisting disability. In *Hanson*, the Court noted there was no evidence of the amount of Hanson's preexisting disability, while

there was some evidence Hanson had a preexisting condition. Herein, the claimant had some preexisting conditions in his upper extremities, neck and shoulder. There was, however, no evidence that these conditions comprised a ratable impairment. Claimant had in the past received some treatment for these conditions but was not restricted from performing his employment duties. Moreover, claimant testified he was asymptomatic until the work-related incident on June 11, 1996, and thereafter he became symptomatic and his condition worsened.

The records proffered regarding the compromise settlement of claimant's workers compensation claim in California in 1993 do not contain any assessment of functional impairment or restrictions. The claimant's back was injured by a piece of machinery. His employer did not pay any medical or disability benefits and the matter was resolved by a compromise settlement. These facts are insufficient to establish a preexisting disability.

The Board acknowledges that Dr. Prostic concluded a portion of the claimant's cervical condition was preexisting. However, following minimal treatment for neck complaints in the past which included problems with a cyst, the claimant had not been assessed a functional impairment for that condition and was not restricted from performing his work duties with respondent because of that condition. Moreover, the rating from the independent medical examiner, Dr. Tisdale, did not include any finding of permanent cervical functional impairment. The Board concludes it is critical that a preexisting condition actually constitutes an impairment in that it somehow limits the worker's activities or abilities. Respondent has failed to establish claimant's employment activities or abilities while working for respondent were limited by any preexisting conditions.

Both Drs. Prostic and Tisdale examined the claimant and proffered opinions regarding the percentage of functional impairment the claimant sustained as a result of his work-related accident. Dr. Prostic examined claimant on April 18, 1997. Dr. Tisdale, the court ordered independent medical examiner, saw claimant on May 13, 1999. When Dr. Prostic examined claimant it was just two months after claimant had stopped working for respondent. By the time claimant was examined by Dr. Tisdale he no longer had any neck complaints.

The Administrative Law Judge adopted Dr. Tisdale's opinions as the more persuasive opinions and the Board agrees. The opinion of the physician appointed by the Administrative Law Judge should not be blindly adopted, however, the physician appointed by the Administrative Law Judge should, on the other hand, be neutral. This does not always mean the rating is most accurate. In this case, the rating by the physician appointed by the Administrative Law Judge appears to correspond with claimant's complaints and to appropriately evaluate claimant's impairment. The Board agrees with and affirms the Administrative Law Judge's decision.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated January 26, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James Phillips, Jr., Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director